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No. 87-——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred in holding that the Federal Energy Regulatory Commission ("FERC" or "Commission") has authority under the Natural Gas Act (15 U.S.C. § 717, *et seq.*) ("NGA") and the Natural Gas Policy Act (15 U.S.C. § 3301, *et seq.*) ("NGPA") to impose common carrier status on interstate natural gas pipeline companies.

LIST OF PARTIES

The parties to the proceeding below included Respondent, Federal Energy Regulatory Commission, and Petitioner, Interstate Natural Gas Association of America. Other parties included Associated Gas Distributors, United Distribution Companies; Texas Eastern Transmission Corp.; Tennessee Gas Pipeline Co.; Natural Gas Pipe Line Company of America; Panhandle Eastern Pipeline Corp.; Trunkline Gas Co.; Texas Gas Transmission Corp.; Transcontinental Gas Pipeline Corp.; ANR Pipeline Co.; Colorado Interstate Gas Co.; Northwest Pipeline Corp.; El Paso Natural Gas Co.; Southern Natural Gas Co.; United States Pipe Line Co.; Northern Natural Gas Co.; Transwestern Pipeline Company; Consumers Power Company; The Peoples Gas Light & Coke Co.; North Shore Gas Co.; Elizabethtown Gas Co.; Northwest Gas Co.; CP National Corp.; Washington Natural Gas Co.; Laclede Gas Co.; Attorney General, State of Louisiana; Association of Texas Intrastate Natural Gas Pipelines; Amoco Gas Co.; Oklahoma Natural Gas Co.; Consolidated Edison of N.Y., Inc., Process Gas Consumers Group; American Iron and Steel Institute; Air Products & Chemicals, Inc.; Fertilizer Institute; American Bakers Association; American Paper Institute; Maryland Industrial Group; Shell Offshore, Inc.; Shell Western Electric and Power, Inc.; Arco Oil & Gas Co.; Ashland Corp.; Cabot Corp.; Chevron, U.S.A. Inc.; Cities Service Oil and Gas Corp.; Conoco, Inc.; Exxon Corp.; Kerr-McGee Corp.; Marathon Oil Co.; Mobil Oil Corp.; Pennzoil Co.; Phillips Petroleum Co.; Placid Oil Co.; Sohio Petroleum Co.; Tenneco Oil Co.; Texaco, Inc.; Texas Gas Exploration Corp.; Union Oil Co.; Ashland Exploration, Inc.; Maryland Peoples Counsel; City of Willcox, Arizona; Arizona Electric Power Cooperative, Inc.; Public Service Commission of the State of New York; Public Utilities Commission of the State of California; American Public Gas Association; Atlanta Gas

Light Co.; Central Illinois Light Co., American Gas Association; Michigan Consolidated Gas Co.; Columbia Gas Transmission Corp.; Southern Indiana Gas and Electric Co.; Memphis Light, Gas and Water Division; Minnesota Public Utilities Commission; National Association of Regulatory Utility Commissioners; Northwest Central Pipeline Corp.; Louisiana Intrastate Gas Corp.; Monterey Pipeline Co.; Southern California Gas Co.; Pacific Gas and Electric Co.; Consolidated Gas Transmission Corp.; Baltimore Gas and Electric Co.; Entex, Inc.; Algonquin Gas Transmission Co.; Cascade Natural Gas Corp.; Alabama Tennessee Natural Gas Co.; Producers Gas Co., *et al*; South Carolina Pipeline Corp.; Arizona Public Service Co.; Phelps Dodge Corp.; Salt River Project Agricultural Improvement and Power District; Arkla, Inc.; Brooklyn Union Gas Co.; Carolina Utility Customers Association; Champlin Petroleum Co.; Chemical Manufacturers Association; Citizens Energy Corp.; Columbia Nitrogen Corp.; Delhi Gas Pipeline Corp.; Florida Gas Transmission Co.; Foothills Pipe Lines; Westcoast Transmission Company Limited; KN Energy, Inc.; Mesa Operating Limited Partnership; Panhandle Producers and Royalty Owners Association; Northern Illinois Gas Co.; Ohio Oil and Gas Association; Pacific Gas Transmission Co.; Pan-Alberta Gas, Ltd.; Philadelphia Electric Co.; Piedmont Natural Gas Co.; Public Service Electric and Gas Co.; Southern California Gas Co.; State Corporation Commission of the State of Kansas; Tenngasco. Corp.; Transok, Inc.; Washington Gas Light Co.; Weirton Steel Corp.; Bethlehem Steel Corp.; West Virginia Consumer Advocate; Wisconsin Power & Light Co.; Valero Transmission Co.; UGI Corp.; State of Michigan and Michigan Public Service Commission; South Jersey Gas Co.; Pennsylvania Public Utility Commission; State of Connecticut; Northern Valley Environmental Counsel; Michigan Gas Storage Company; Amoco Production Co.; Columbia Gas Distribution Co.; Armstrong

World Industries; Commonwealth of Kentucky Public Service Commission; Diamond Shamrock Exploration Company; Gas Distributors Information Service; Sun Exploration and Production Company; Kansas Power and Light Company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Interstate Natural Gas Association of America ("INGAA"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered on June 23, 1987, in *Associated Gas Distributors v. Federal Energy Regulatory Commission*, No. 85-1811, 824 F.2d 981 (D.C. Cir. 1987).

INGAA is a nonprofit national trade association representing virtually all of the major interstate natural gas transmission companies in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, *supra*, and the Natural Gas Policy Act,

supra. A list of INGAA's membership is set forth at the end of this Petition in Attachment A.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 824 F. 2d 981 (D.C. Cir. 1987). The order denying rehearing and the order denying rehearing *en banc* are not reported. Each of these documents is reprinted in the separately bound Appendix which is being submitted jointly herein by Texas Eastern Transmission Corporation, the City of Willcox, Arizona, the Arizona Electric Power Cooperative, Inc., and Petitioner ("Joint Appendix").

Order No. 436 of the FERC, reviewed by the Court of Appeals, below, is reported at 50 Fed. Reg. 42408 (Oct. 18, 1985), FERC Statutes and Regulations [Regulations Preambles] (CCH) ¶ 30,665 (1985). Related orders include Order No. 436-A, 50 Fed. Reg. 52217 (Dec. 23, 1985), F.E.R.C. Statutes and Regulations [Regulations Preambles] (CCH) ¶ 30,675 (1985); Order No. 436-B, 51 Fed. Reg. 6398 (Feb. 24, 1986), F.E.R.C. Statutes and Regulations [Regulations Preambles] (CCH) ¶ 30,688 (1986); Order No. 436-C, 51 Fed. Reg. 11566 (April 4, 1986), 34 F.E.R.C. (CCH) ¶ 61,404 (1986); Order No. 436-D, 51 Fed. Reg. 11569 (April 4, 1986), 34 F.E.R.C. (CCH) ¶ 61,405 (1986); and Order No. 436-E, 51 Fed. Reg. 11566 (April 4, 1986), 34 F.E.R.C. (CCH) ¶ 61,403 (1986).

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1987. The orders denying petitions for rehearing and suggestions for rehearing *en banc* were entered on September 15, 1987.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of Sections 5 and 7 of the Natural Gas Act of 1938, 15 U.S.C. § 717d and 717f, and Sections 311(a) and 602(b) of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3371(a) and 3432(b). These statutory provisions are reproduced in the Joint Appendix.

STATEMENT OF THE CASE

This petition for a writ of certiorari seeks reversal of a portion of a decision of the United States Court of Appeals for the District of Columbia Circuit, interpreting the provisions of FERC Order No. 436, the NGA, and the NGPA. In its decision, the Court of Appeals states clearly the extreme importance of these proceedings:[1]

> The Order [No. 436] envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry: the passage of the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1982) ("NGA") in 1938, the imposition of price controls on independent producers' wellhead sales under *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), and adoption of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1982) in 1978.

This proceeding is of critical legal and economic importance to interstate natural gas pipelines and consumers of natural gas, as well as all other participants in the natural gas industry. The essence of this proceeding is an interpretation by the Court of Appeals of both the NGA and the NGPA that is prohibited by the terms of those statutes. The opinion of the Court below, construing the FERC's Order No. 436, the NGA, and the NGPA, holds that the Commission has authority to im-

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[1] *Associated Gas Distributors, et al.* v. *Federal Energy Regulatory Commission*, 824 F.2d at 993 (Joint Appendix at 17a).

pose "open access," common carrier status upon interstate natural gas pipelines. This is inconsistent with the operation, regulation, and contracting practices of such pipelines as contract carriers over the past fifty years. It also removes from these pipelines the ability to minimize their costs and maximize efficiency in light of demands for different kinds of service. Furthermore, it reverses the long-standing pattern of regulatory authorizations under the NGA, which has been based upon private contracts agreed upon by pipelines and their customers. Such changes, opposed before the FERC and the Court of Appeals by pipelines and by others, also violate statutory prohibitions by involuntarily converting natural gas pipelines into "common carriers."

Order No. 436 accomplishes these changes by imposing an "open access" condition upon all transportation by pipelines of gas owned by others pursuant to either "blanket certificates" issued by the FERC to pipelines under Section 7(c) of the NGA (15 U.S.C. § 717f(c)), or pursuant to Section 311(a) of the NGPA (15 U.S.C. 3371(a)). The "open access" requirement compels pipelines to provide such transportation service to all who desire it, to the full extent of the pipelines' capacity. This requirement applies irrespective of differences in conditions, differences between would-be customers, and differences in the effects on the pipelines and their ability to render reliable service.

The Court of Appeals upheld the "open access" conditions of Order No. 436, holding that the FERC has authority to impose common carrier status upon pipelines. That holding was made despite the fact that the FERC itself stated in the rulemaking proceeding below that it has no such authority to impose common carrier status. Instead, the FERC defended the "open access" condition by its claim that performance of transportation pursuant to Order No. 436 is a "voluntary act," and thus

not subject to statutory prohibitions. The Court of Appeals, however, found that transportation under Order No. 436 is not voluntary, but rather is like giving a condemned man "the choice between the noose and the firing squad. . . ." (824 F.2d at 1024) (Joint Appendix at 81a). However, the Court of Appeals went on to say that the involuntary nature of such transportation is of no matter, and that the Commission can convert pipelines into common carriers.

This Court is therefore asked to review and reverse the decision of the Court of Appeals, upholding the "open access" transportation requirements of FERC Order No. 436, in the face of statutory prohibitions, recognized by the FERC, against making natural gas pipelines into common carriers.[2]

REASONS FOR GRANTING THE PETITION

I. The "Open Access" Transportation Requirement Will, If Not Reversed, Restructure The Natural Gas Industry And Damage The Nation's Natural Gas Service

The "open access" transportation requirements imposed by the FERC which are the subject of these proceedings, if not reversed, will cause "a complete restructuring of the natural gas industry", to quote the Court of Appeals, below. (824 F.2d at 993) (Joint Appendix at 17a). That Court regards this case as one of the great "regulatory milestones" of the natural gas industry. *(Id.)*. The requirements of Order No. 436 have already played a major part in drastically reducing pipeline sales of gas.

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[2] The Court of Appeals remanded Order No. 436 for correction of errors (824 F.2d at 1044) (Joint Appendix at 124a), but the "open access transportation regulations" of Order No. 436 have been reissued intact by the FERC, in Order No. 500, *et seq.* and are now in effect and are being applied by the FERC. FERC Order No. 500, 52 Fed. Reg. 30334 (August 14, 1987), FERC Statutes and Regulations [Regulations Preambles] (CCH) ¶ 30,761 (1987).

This has raised pipeline exposure under gas purchase contracts with producers to billions of dollars as a result of gas which pipelines must pay for even if they cannot take it. Consumers of natural gas, in turn, are confronted with the prospect of paying higher prices for gas due to these additional "take or pay" costs. These proceedings are, therefore, of fundamental importance to consumers of natural gas, natural gas pipelines, and all participants in the natural gas industry.

The "restructuring of the natural gas industry" is being done in clear violation of statutory limitations and prohibitions, as shown in the following subsections of this Petition. That restructuring is having a huge, permanent, and adverse impact upon the entire industry. Prompt correction is imperative to prevent irreparable damage to nationally vital natural gas service. The damaging effects already produced by the open access, common carriage requirements include, *inter alia*:

a. a dramatic decline in pipeline sales from their former level;

b. the inability of pipelines to purchase the volumes of gas called for in their gas purchase contracts with producers;

c. thousands of producer claims for "take-or-pay" payments against pipelines, and hundreds of lawsuits in state and federal courts; [3]

d. a decline in drilling for natural gas reserves to historically low levels; and

e. a drastic fall in pipeline revenues.

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[3] In fact, hundreds of millions of dollars of "take-or-pay prepayments" and settlement payments already have been made by pipelines to producers, and the situation is only worsening while the "open access" transportation program of Order No. 436 is in effect.

This restructuring of the pipeline industry has raised questions as to the security of the nation's gas supply, and has threatened the financial and operational base of the pipeline industry. Moreover, these adverse results have been achieved in violation of statutory standards, as shown below.

II. The Court Of Appeals Has Unlawfully Authorized FERC Imposition Of Common Carrier Requirements On Interstate Natural Gas Pipelines

A. Order No. 436 Converts Interstate Natural Gas Pipelines Into Common Carriers

The portions of FERC Order No. 436 which convert interstate natural gas pipelines into common carriers require that such pipelines must provide "open access" transportation to all would-be shippers on a "first come, first served" basis. The Court of Appeals decision states:

> Order No. 436 imposes an "open-access" commitment on any pipeline that (1) secures a "blanket certificate" to provide gas transportation, pursuant to § 7 of the NGA, 15 U.S.C. 717f (1982), or (2) actually provides transportation under § 311 of the NGPA, 15 U.S.C. § 3371 (1982). See 18 C.F.R. §§ 284.8(b), 284.9(b). (Footnote omitted). (824 F.2d at 997) (Joint Appendix at 24a).[4]

To force pipelines to conform to the "open access", "first come, first served" requirements means that pipelines are being forced to be common carriers, *since those requirements are the essence of common carriage.* This Court so identified the essential characteristics of common carriage in *Federal Communications Commission* v. *Midwest Video Corporation,* 440 U.S. 689 (1979). The Federal Communications Commission rules involved there denied cable television systems discretion to determine

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[4] 18 C.F.R. §§ 286-8(b) and 284.9(b), and related "open access" language of Order No. 436, are set forth in the Joint Appendix.

who could use their "access channels", and what could be transmitted over those channels. This Court found that the FCC's rules imposed common-carrier obligations on the cable operators, in violation of Section 3(h) of the Communications Act of 1934, which provides that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier", stating (440 U.S. at 700):

> With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, pro tanto, to common-carrier status. A common-carrier service in the communications context is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . ."
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> * * * *
>
> A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal.".
>
> * * * *
>
> The access rules plainly impose common carrier obligations on cable operators. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis. (Footnotes omitted.)

Order No. 436 imposes virtually the same requirements upon natural gas pipelines. Like the cable TV systems in *Midwest Video*, the pipelines in the instant proceeding *cannot* "make individualized decisions, in particular cases, whether and on what terms to deal". Other persons—those who wish to use the pipeline facilities—have the authority to impose such decisions upon pipelines. Pipelines must provide such "open access" transportation

to anyone who requests it, on a "first-come, first-served" basis, to the limits of the full capacity of their facilities.

The District of Columbia Circuit itself recognized that the lack of ability of the carrier to make "individualized decisions, in particular cases, whether and on what terms to deal" is the prime attribute of common carrier status. *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). That same Court also found, in an earlier case, *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), that:

> What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently . . ." (Footnote omitted).

It is thus clear that FERC Order No. 436 has the effect of requiring pipelines to operate under common carriage requirements. That, as will be shown below, is in violation of statutory prohibitions and statutory limits on the FERC's authority. The decision of the Court of Appeals herein does not refute the fact that the Order No. 436 requirements convert pipelines into common carriers. Instead, the decision deals with the subject, in the discussions of common carriage under each of the statutes involved here. Thus, the two following subsections discuss each statute, the NGA, and the NGPA.

B. The NGA Does Not Allow The Imposition Of Common Carrier Status On Interstate Natural Gas Pipelines

In enacting the NGA, Congress did not intend that natural gas pipelines regulated under that statute would be common carriers. This is reflected in the legislative history of that Act where Congress considered and spe-

cifically rejected making natural gas pipelines common carriers. It is also reflected in numerous judicial interpretations of the NGA, and its sister statute, the Federal Power Act (16 U.S.C. 824), rejecting the notion that public utilities regulated under those statutes can be made to be common carriers.

In its first legislation pertaining to natural gas pipelines—the Interstate Commerce Act of 1906—Congress expressly exempted transporters of natural gas from common carrier status, as defined in that statute. Pub. L. No. 59-337, 34 Stat. 584. Since that time, Congress has repeatedly rejected suggestions to make interstate natural gas pipelines common carriers. In 1914, for example, the House of Representatives rejected a Senate bill that would have amended the Interstate Commerce Act of 1906 to make natural gas pipelines subject to the duty to transport on demand. S. 3345, 63d Cong., 2d Sess., 50 Cong. Rec. 5847-49 (1913). Other such bills were considered and rejected in 1935 and 1936.

Most significant, of course, is the NGA itself. Enacted in 1938, the NGA contains no common carrier provision, and, as reflected by contemporary testimony of witnesses in support of the bill, was never intended to authorize the imposition of common carrier obligations.[5]

In the one clear instance where Congress did impose a common carrier type obligation on interstate gas pipelines crossing Federal Lands, the Mineral Leasing Act of 1920 (30 USC 185, 41 Stat. 449, Feb. 25, 1920), Congress later reversed itself. In 1953, well after the passage of the NGA, Congress amended the Mineral Leasing Act by exempting regulated natural gas pipelines from the common carrier requirement of that Act. (30 U.S.C.

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[5] Witnesses before Congress testified relative to the NGA, and its precursors, that common carriage requirements for interstate natural gas pipelines were not intended. See Attachment B *infra*, Summary of Pertinent Legislative History.

185(r)(3)(A); 67 Stat. 557, Aug. 12, 1953). Had pipelines been under a common carrier obligation due to the NGA, the 1953 amendment of the Mineral Leasing Act would have been a meaningless gesture. That it was not is a clear indication of the absence of any common carrier obligation in the NGA.

This is confirmed also by the 1947 amendment of the NGA which gave to interstate gas pipelines the right of eminent domain. It is clear from the legislative history of the bill which added Section 7(h) to the Act that the need for the amendment arose from the fact that pipelines did not previously have eminent domain authority precisely because they were not common carriers.[6]

Cases construing the NGA likewise demonstrate that common carriage status is not to be imposed on gas pipelines. It has been held by this Court that, under the NGA, the relationship of a pipeline and its customers is set in the first instance by a freely negotiated private commercial contract. *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956). That contract is then filed with the Commission under Section 7 of the NGA for approval. The Commission has a "veto" power over the contract if it does not meet the public interest standards of the NGA. *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 17 (1961). But, as this Court has previously ruled, the Commission has no power to compel the pipelines to initiate service.[7] These basic statutory provisions cannot be squared with

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[6] See Attachment B *infra* at 5a *et seq.*

[7] In *Transco*, this Court stated:

> "The Commission [FPC] cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification." 365 U.S. at 17. (Footnote omitted). (emphasis theirs).

any notion of common carriage or the power to compel open access transportation.[8]

The only power the FERC has to require service under the NGA is pursuant to Section 7(a), 15 U.S.C. § 717f(a), which authorizes the Commission to order a natural gas company to expand *existing sales* service to extend and improve facilities needed by local distribution companies. Except in situations conforming to the strict requirements of Section 7(a), the Commission has no power under the NGA to impose *new* service obligations on interstate pipelines, see *e.g.*, *Panhandle Eastern Pipe Line Co.* v. *FERC*, 15 FPC 46, 56-59 (1956), *aff'd*, *Central West Utility Co.* v. *FPC*, 247 F.2d 306, 311 (1957); *Consolidated Gas Company of Florida, Inc.* v. *Florida Gas Transmission Co.*, 28 FERC (CCH) ¶ 61,350 (1984).[9] That is the long-standing pattern of regulation under the NGA, recognized by this Court, under which pipelines and customers agree upon service by private contract. *Mobile*, *supra*.

Furthermore, the Commission itself does not contend that it has authority to impose common carriage. In Order No. 436-A, the FERC candidly acknowledged that "its actions could neither directly nor indirectly impose common carrier obligations on pipelines in violation of the NGA."[10]

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[8] *In Maryland People's Counsel* v. *FERC*, 761 F.2d 768, 770 (D.C. Cir. 1985), the D.C. Circuit held in the context of the review of a Section 7(c) certificate that a pipeline could not be required to function as a common carrier. Judge Scalia, writing for the Court, stated:

> While they may transport gas purchased directly by distributors or end-users from producers, they have no common-carrier obligation to do so.

[9] The Commission has recently interpreted Section 7(a) as *denying* it the power to compel transportation. *Rural Energy Systems, Inc.*, 34 FERC (CCH) ¶ 61,389 at p. 61,723, n. 12 (1986).

[10] FERC Statutes and Regulations (CCH) ¶ 30,675 at p. 31,648 (1985).

Moreover, reference to precedent of this Court demonstrates that the Commission does not have the authority to impose common carrier obligations on persons regulated by it. In *Otter Tail Power Company* v. *United States*, 410 U.S. 366 (1973), this Court indicated clearly that under provisions of the Federal Power Act, 16 U.S.C. § 824 *et seq.* ("FPA"), which are to be construed in *pari materia* with analogous provisions of the NGA,[11] the Commission may not use its authority, to impose common carrier obligations. In addressing "wheeling" of electric power, *i.e.*, the Commission's authority to order transmission of electricity, this Court found in *Otter Tail* that:

> there is no authority granted the Commission under Part II of the Federal Power Act to order it, [wheeling], for the bills originally introduced contained common carrier provisions which were deleted. (410 U.S. at 375,) (footnote omitted).[12]

Likewise, in the instant case, even the Court of Appeals agreed that the legislative history of the analogous provisions of the NGA, namely Section 4 and 5:

> provides strong support only for the point that Congress declined itself to impose common carrier status on the pipelines—a proposition that is unquestioned

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[11] The parallel structures of the NGA and FPA compel similar statutory constructions. Provisions of the FPA are to be read *in pari materia* with analogous provisions of the NGA. *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1965). The "unusual similarity" between the two acts is discussed at some length in *City of Gainesville* v. *Florida Power & Light Co.*, 488 F. Supp. 1258, 1277-78 (S.D. Fla. 1980).

[12] See also, the following decisions denying FERC power to order carriage (wheeling): *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983); *Richmond Power & Light, etc.* v. *FERC*, 574 F.2d 610 (D.C. Cir. 1978); *New York State Electric & Gas Corp.* v. *FERC*, 638 F.2d 388 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); *also cf. Northern California Power Agency* v. *FPC*, 514 F.2d 184, 189 (D.C. Cir. 1975), *cert. denied* 423 U.S. 863 (1975).

> and is evident from the language of the statute itself. 824 F.2d at 997.

However, the Court of Appeals then proceeded to ignore the precedent of *Otter Tail* by finding that the Commission has the power to impose common carrier obligations. In doing so, the Court of Appeals wrongly interpreted the NGA, and thereby ignored the clear language, intent and legislative history of the statute, and judicial precedent.

The Court of Appeals below incorrectly held that common carriage could be imposed under Sections 4 and 5 of the NGA in order to prevent "undue discrimination". But questions of "undue discrimination", if any, are to be resolved and remedied by reference to the Commission's substantive powers under the NGA, *e.g.*, the power to modify tariffs, correct rates, *etc.* There is, as shown above, no substantive power to order common carriage and the Commission may not "bootstrap" its authority by imposing remedies which are *ultra vires* to its enabling legislation.[13] Yet, that is precisely what has been done here. The Court of Appeals has reached out to impose a remedy which is not authorized by the NGA—the imposition of common carriage—in order to cure the perceived problem of undue discrimination. That is legal error which requires review by this Court.

C. The NGPA Expressly Prohibits Regulation Of Interstate Natural Gas Pipelines As Common Carriers

Order No. 436 imposes "open access" requirements upon transportation performed pursuant to the authority of Section 311(a) of the NGPA (15 USC 3371(a)). But Section 602(b) of the NGPA, 15 U.S.C. § 3432(b)

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[13] *Northern Natural Gas Co.* v. *FERC*, 827 F.2d 779 (D.C. Cir. 1987); *Panhandle Eastern Pipe Line Co.* v. *FERC*, 613 F.2d 1120 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980); *Willmut Gas & Oil Co.* v. *FPC*, 294 F.2d 245 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975 (1962).

(1982), provides a specific limitation upon such authorization of transportation:

> (b) Common carriers.
>
> No person shall be subject to regulation as a common carrier under any provision of *Federal* or State law by reason of any transportation—
>
> * * * *
>
> (2) authorized by the Commission under section 3371(a) of this title [section 311(a) of the NGPA]. (emphasis added).

In violation of that prohibition, Order No. 436 does require pipelines which perform Section 311(a) transportation to be regulated as common carriers, as shown in Section II A, above.

Until Order No. 436, the FERC had no illusion about its authority to impose common carirer obligations upon pipelines which perform transportation under Section 311(a) of the NGPA. In its Order No. 46, promulgating regulations governing such transportation, the FERC said:

> There is no indication in section 311(a)(1), or in its legislative history, that interstate pipelines were intended to be required to render transportation services. Indeed, section 602(b)(2) specifically states that no person shall become a common carrier by reason of section 311(a) transportation. Thus, the Commission is without authority to require transportation services by interstate pipelines solely by reason of section 311(a)(1).[14]

Order No. 436 and the Court of Appeals' decision, however, are inconsistent with this correct interpretation of the NGPA.[15]

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[14] Final Part 284 Regulation Under The Natural Gas Policy Act of 1978, Order No. 46, Docket No. RM79-75, 1977-1981 FERC Statutes and Regulations (CCH) ¶ 30,081 (1979).

[15] The fact that the Congress did not intend interstate natural gas pipelines to be made common carriers is further borne out by

[Footnote Continued]

The Court of Appeals' decision below goes to great lengths in an attempt to read the common carrier prohibition of Section 602(b) of the NGPA as not prohibiting imposition of a "duty not to discriminate." But the Court below fails to recognize that its ruling destroys the ability of the pipeline "to make individualized decisions, in particular cases, whether and on what terms to deal". That, as quoted by this Court in *Midwest Video, supra,* is the *essence* of the distinction between common carriage and contract carriage. If the statutory prohibition of NGPA Section 602(b) against regulating a pipeline as a common carrier is construed to allow the pipeline to be deprived of the right to make such individualized decisions, then the meaning and importance of such prohibition has been removed. It has been read out of the statute.

Having stripped Section 602(b) of the NGPA of its clear purpose, the Court of Appeals decision below strains to try to give an alternative meaning to the common carriage prohibition of the NGPA. The Court of Appeals reads Section 602(b) as prohibiting imposition of common carriage burdens by the States only. (824 F.2d at 1002) (Joint Appendix at 35a). But that is clearly contradicted by Section 602(b)'s explicit prohibition of "regulation as a common carrier under any provision of *Federal* or State law." 15 U.S.C. § 3432. (emphasis added). The Court of Appeals was not able, nor did it attempt, to explain what that limitation on "Federal Law" covers, in view of its holding that Section 602(b) does not cover such federal action as FERC Order No. 436. In fact, the Court of Appeals said, with regard to the federal provision of Section 602(b), that "we have not identified similar federal hazards." (824 F.2d at 1002) (Joint Appendix at 36a).

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[15] [Continued]

NGPA Title II—Incremental Pricing (15 USC § 3541, *et seq.*)—and NGPA Title IV—Natural Gas Curtailment Policies (15 USC § 3391 *et seq.*)—which are totally inconsistent with the concept of common carriage.

The Court of Appeals also notes that the Section 602(b) prohibition of common carriage applies to transportation under the presidential emergency authority set forth at 15 USC § 3362(c) and 3363(b), (c), (d), or (i), as well as transportation under Section 311(a) of the NGPA. The decision then asserts that "If the President determined that imposition of something like common-carriage were necessary to meet such an emergency, it is hardly credible that § 602 would stand in the way", and asserts that "By the same token", Section 602 "must not flatly bar the Commission from imposing similar conditions on gas transportation under § 311" (824 F.2d at 1003) (Joint Appendix at 37a). Those statements are assertions, not reasoning. They continue to read Section 602(b) out of the NGPA. They make assumptions, in *dicta*, as to Presidential power in times of emergency, an issue not before the Court, and use them as the basis for a holding as to FERC's power in times of non-emergency. The assertions involve no analysis of why—or whether—the "similar conditions" under review here relative to FERC Order No. 436 would be relevant in "emergencies", much less any indication that Congress so intended.

In short, the Court of Appeals has failed to refute the fact that the explicit, unconditional prohibition of Section 602(b) of the NGPA, against "regulation as a common carrier by reason of any transportation" under NGPA Section 311(a), "by any provision of Federal or State law", makes the "open access" transportation requirements of Order No. 436 unlawful. The Court of Appeals reading of such prohibition is clearly in error.

CONCLUSION

The Court of Appeals, as well as the FERC, has acknowledged that the "open access transportation" mandated by FERC Order No. 436 makes this case one of a handful of "regulatory milestones" in the natural gas in-

dustry. The issue here is one of wrongful statutory interpretation contrary to fifty years of regulatory practice. Accordingly, the issuance of a writ of *certiorari* is required to correct this error.

Respectfully submitted,

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ATTACHMENTS

ATTACHMENT A

1988
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
ACTIVE MEMBERSHIP

AlaTenn Resources, Inc.
Arkla, Inc.
Blue Dolphin Pipe Line Company
The Coastal Corporation
Columbia Gas Transmission Corp.
Consolidated Natural Gas Company
El Paso Natural Gas Company
Enron Corp.
Granite State Gas Transmission, Inc.
Great Lakes Gas Transmission Company
Kentucky West Virginia Gas Company
KN Energy, Inc.
Michigan Gas Storage Company
MidCon Corp.
Mountain Fuel Resources, Inc.
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
SONAT, Inc.
Tenneco Gas Pipeline Group
Texas Eastern Gas Pipeline Company
Texas Gas Transmission Corporation
Texas Oil & Gas Corporation
Transco Gas Company
United Gas Pipe Line Company
Valero Interstate Transmission Company
Valley Gas Transmission, Inc.
The Williams Companies

ATTACHMENT B

SUMMARY OF PERTINENT LEGISLATIVE HISTORY

1. Common carrier status for gas pipelines was first considered by Congress when it chose, in 1906, to regulate oil pipelines as common carriers. But the law which emerged, The Interstate Commerce (Hepburn) Act of 1906, excepted "transportation of . . . natural or artificial gas, by means of pipelines." 34 Stat. 584.

2. On February 15, 1928, the Senate took action by passage of Senate Resolution 83 (70th Congress, 1st Session). This resolution, which led ten years later to the Natural Gas Act, authorized and directed the Federal Trade Commission (FTC) to inquire into, and report to the Senate, concerning various phases of the interstate distribution of electricity and gas. This investigation was extended by Senate Joint Resolution 115 (73rd Congress, 2nd Session) and the first part of the report was submitted to the Congress on December 31, 1935. The report submitted by the FTC in compliance with this resolution eventually consisted of ninety-five volumes.

In one section of the report dealing principally with public utility holding companies, Part 73(a), filed January 28, 1935, the FTC proposed that interstate gas pipelines be made subject to federal control and regulation as common carriers *or* public utilities.

The following month, on February 6, 1935, a bill was introduced in the House (H.R. 5423, 74th Congress, 1st Session) by Mr. Rayburn for the control and elimination of public utility holding companies (79 Cong. Rec. 1624). Title III of this bill, providing for the regulation of the transmission and sale of natural gas in interstate commerce, with significant amendments, ultimately became the Natural Gas Act of 1938. As originally drafted, Section 303(a) of Title III of this bill contained a common carrier provision reading as follows:

> It shall be the duty of every distributor [including, by definition, pipelines] to furnish natural gas to, exchange natural gas with, and *transmit natural gas for any person* upon reasonable request therefor. (emphasis supplied).

When the hearings were held on this bill, the foregoing quoted provision was attacked as being unrealistic and unworkable by virtually every witness from the natural gas industry who appeared before the Committee.[2]

Mr. Walter M. W. Splawn, Commissioner, Interstate Commerce Commission, testified that when Title III was originally drafted as a part of the FTC Report and carried over into H.R. 5423,

> it was title II with natural gas substituted for electrical energy so that title III inadvertently went beyond the intent in that regard (common carrier).

This was occasioned, as he stated, "due to the rush in crowding this through at the last moment." He further stated:

> Natural-gas pipe lines have a different history from the oil pipe lines. The oil pipe line, when this committee was considering whether or not oil pipe lines should be regulated as common carriers, many years ago, the companies' advice to this committee was that the oil pipe lines held themselves out as common carriers.
>
> Now, the people in the natural-gas industry contend that they have never held out that the natural-gas pipeline is a common carrier; they contend that it would be very impractical to carry on the business in that way.

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[2] Hearings before Interstate and Foreign Commerce Committee, House of Representatives, 74th Cong., 1st Session (1935) re H.R. 5423, pp. 1698-1700, 1729-1733, 1740-1741, 1803-1804, 1813-1814, 84-1842, 1867, 1907, 2282-2284.

> It is my thought that since that would be a most controversial proposition that you would do well, for title III, to give most serious consideration to the representation the companies made here the other day with reference to that feature of the bill.[3]

On December 31, 1935, the FTC submitted to the Senate the final section of its report, Part 84-A, dealing "primarily with groups and companies of the natural gas and natural gas pipeline industry." The section concluded with a summary statement of recommendations (pp. 1615-1617) but there was *no* recommendation for any "common carrier" provision. It is thus important to note that, although the FTC in its preliminary report to the Congress had recommended that gas pipelines be either common carriers *or* regulated public utilities, the final report, made after further hearings and advice, was silent as to any common carrier suggestion. It recommended only that such lines be regulated as utilities.

H.R. 5423 was never reported out by the House Committee on Interstate and Foreign Commerce. When H.R. 5423 died, the common carrier provision died with it. None of the subsequent drafts of legislation leading up to the final enactment of the Natural Gas Act in 1938 contained any common carrier provision.

3. H.R. 11662, another NGA progenitor, gave rise to, more hearings in 1936. While this bill did not contain a common carriage provision, the question of common carrier status for interstate gas pipelines resurfaced. In those hearings, 74th Congress, Second Session, before a sub-committee of the House Interstate and Foreign Commerce Committee, Mr. Dozier A. De Vane, the Solicitor of the Federal Power Commission, testified as follows:

> Mr. Cole. Where you find a line is not transporting gas to its fullest capacity, the idea is to compel

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[3] Tr. pp. 2212-2213.

that line to take gas from anyone in the field where the pipe line gets its gas?

Mr. De Vane. There is no provision in here which gives the Commission the authority to make them take gas, no; they would have to have available at the source sufficient gas to fill the pipe line to its capacity.

Mr. Cole. They are not made common carriers.

Mr. De Vane. No; not the gas pipe lines.[4]

Similarly, Col. William T. Chantland, Attorney in Charge of Legal Work, Federal Trade Commission Utilities Investigation, testified before the same subcommittee, on April 3, 1936, concerning H.R. 11662 as follows:

Mr. Cole. This bill does not attempt to make the pipe lines, gas-pipe lines, common carriers?

Mr. Chantland. No; and I think that for very good and sufficient reasons.[5]

4. When Congress, in 1947, amended the Natural Gas Act by adding Section 7(h), giving interstate natural gas pipelines the right of eminent domain, it did so because the pipelines were not common carriers. It was well-established under the laws and the various states that common carriers customarily had, by virtue of their obligation to transport for others, the right of eminent domain. It was believed and reasonably so that common carriers could not discharge their obligation without this right. However, not being common carriers, interstate natural gas pipelines found in 1947 that they could not rely on the eminent domain laws of the respective states.[6] This is reflected in Report No. 429 of the House Committee on Interstate and Foreign Commerce to Accompany

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[4] Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 2nd Session (1936) re H.R. 11662, p. 38.

[5] *Id.* at 58.

[6] 15 U.S.C. § 717(f)(H) 61 Stat. 459.

S. 1028—80th Congress, 1st Session, concerning the granting of the right of eminent domain. The Report states (p. 3):

> Rail, water, and air carriers, under the law are required to operate as common carriers, and as such, are required to serve the public in the several States through which such carriers operate. *By reason of this factual situation, this class of common carriers may, as a consequence thereof, rely upon the eminent domain laws of the respective States.* Interstate gas pipe lines constructed by right of license under certificates of convenience and necessity from the Federal Power Commission, *are not required to operate as 'common carrier pipelines.'* The usual and ordinary service of an interstate natural gas company is the movement of gas which has been either produced by the natural gas company or purchased from others from the source of supply in one State to specified and limited markets of the natural gas company in another State. Thus, the right of an interstate natural gas pipe line to cross intervening States in which no service is performed is a necessary protection of the free flow of commerce among the States and which can only be furnished by the Congress under its paramount jurisdiction to regulate interstate commerce. (emphasis supplied).

Obviously it was the Congressional intent that interstate natural gas pipelines remain what they are, namely, "contract carriers," and that they not become common carriers.